

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1186

To be argued by
ARMENDE LESSER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

ROBERT M. LINDAU,

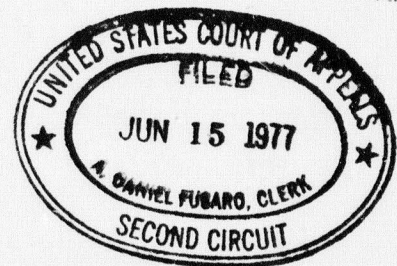
Defendant-Appellant.

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Docket No.
77-1186

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P/S

REPLY BRIEF FOR DEFENDANT-
APPELLANT ROBERT M. LINDAU



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

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Defendant-Appellant.

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REPLY BRIEF FOR DEFENDANT-
APPELLANT ROBERT M. LINDAU

The Government brief makes no response to the questions before this Court, i.e.:

(a) Is the crime of embezzlement committed when, as in the instant case, a Government mailman in the course of his employment removes mail from separations containing mail for other routes; places this mail in the Government delivery bag provided for that purpose; and is then apprehended while proceeding to his route?

(b) Did the Court adequately explain the meaning of embezzlement in response to the jury's query, "Please clarify what embezzlement means?" (Tr. 151-152)

(a) This record does not support the statutory crime of embezzlement in that it lacks the commission of a single overt act consistent with the conversion of property to one's own use nor is there evidence that this appellant violated rules and/or regulations of the postal system.

The facts are not in dispute, and in order to give substance to the charge herein, the Government strays completely from its appointed task by its reliance upon innuendos and inferences. The cases cited in the appellant's brief fully support his contention that an overt act consistent with embezzlement is absolutely necessary to come within the confines of embezzlement as a crime. This contention finds support in many of the other Circuits in the Federal Judicial System where it has consistently been held that the prosecution must prove criminal intent even though such intent requirement is not spelled out in embezzlement statute. (United States v. Strickland, 509 F.2d 273, 5th

Circ. 1975; United States v. Moseley, 507 F.2d 257, cert. denied, 420 U.S. 991; United States ex rel. Burke v. Erickson, 438 F.2d 326, cert. denied, 402 U.S. 1011, 8th Circ., 1971.

The Government places considerable stress on the inference of consciousness of guilt, citing a number of decisions of this court* and decisions in other jurisdictions arising out of a statement made by the defendant to the inspectors that he did not know "how the misappropriated mail got into his mail bag." (G. Br. 12) In United States v. Johnson,** 513 F.2d 819, 2nd Cir. 1975, this Court held:

"...this Circuit in (citing cases) has held that falsehoods told by a defendant in the hope of extricating himself from suspicious circumstances are insufficient proof on which to convict where other evidence of guilt is weak and the evidence before the court is as hospitable to an interpretation consistent with the defendant's innocence as it is to the

*The cases cited by the Government are not proper in the context of this case. United States v. Parness, 503 F.2d 430, 2d Cir. 1974 involves false testimony before the Grand Jury; United States v. Erb, 543 F.2d, 442 (2d Cir.), cert. denied, 97 S.Ct. 493, involves similar acts pertaining to false registration statements in connection with public offerings of common stock.

**Cited by the Government, p. 12.

Government's theory of guilt. Accord United States v. Lopez-Ortiz, 492 F.2d 109, pet. for reh. en banc denied, 494 F.2d 1296 (5 Cir. 1974). (Emphasis supplied.)

The Government, in its effort to bolster its case, improperly states that "(T)here was also proof of a subsequent similar act, a larceny committed by Lindau in the interval between his arrest and the trial." (G. Br. p. 13) The "subsequent similar act" referred to by the Government cites an incident involving the "theft of property from an auto under \$200. in June 1976." (Tr. 121) Clearly, this is not a similar act as defined by this Court in United States v. Chestnut, 533 F.2d 40, 2d Cir., cert. denied, 429 U.S. 829 (1976). Nor is Chestnut correctly cited in the context of this case. Chestnut did not involve a postal service crime under Chapter 83 of the United States Code. At bar the crime of embezzlement was never completed.

(b) In response to the jury's query, "Please clarify what embezzlement means?" (Tr. 151), the Court repeated the same definition contained in its charge to the jury. While counsel may have been remiss by not

filing an objection, the adequacy of the explanation is rightfully before this Court. It is respectfully submitted that the strict legal phraseology of the charge and explanation is not an adequate response to a jury seeking further instruction so that the meaning of the crime charged and the facts before it could be properly equated and permit a knowledgeable determination of the issue before the jury.

Conclusion

It is respectfully submitted that the judgment of conviction be set aside and the indictment dismissed.

Respectfully submitted,

ARMENDE LESSER
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Appellant Robert M. Lindau

6/14/77

I, Armando Lessor, an attorney
do hereby certify - That
on June 14, 1977 I mailed
a copy of the within Reply Brief
upon Raymond A. Levittes,
Assistant United States
ATTORNEY in a post
paid wrapper addressed
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